SEP 27 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 403

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor (appellant in the court below), respectfully suggests that there is a diminution of the record in the above entitled cause, and respectfully moves that this Honorable Court issue its writ of certiorari herein directed to the Arkansas Supreme Court commanding that court to certify and send to this Court certain papers which are of record in that court in this cause. These papers are particularly described as follows:

> Dissenting opinion of the Honorable Griffin Smith, Chief Justice of the Supreme Court of Arkansas, concurred in by Associate Justice Honorable J. Seaborn Holt.

Said dissenting opinion was not on file at the time the Clerk of the Supreme Court of Arkansas prepared the transcript of the record in this cause, and therefore was not included in said record. A certified copy of said opinion is hereto attached.

WHEREFORE, your petitioner prays that a writ of

certiorari be issued out of and under the seal of this Honorable Court directed to the Arkansas Supreme Court commanding that court to certify and send to this Court the papers enumerated herein.

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

I, Thomas B. Pryor, counsel for the petitioner in the above entitled cause do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true; except such facts as are alleged upon information and belief, and, as to those facts, that I believe them to be true.

THOMAS B. PRYOR,
Attorney for Petitioner.

Sworn to and subscribed before me this 21st day of September, 1940.

G. BYRON DOBBS,
Notary Public
State of Arkansas.

(Notary's Seal)
My commission expires: Aug. 10, 1941.

Guy A. Thompson, Trustee for
The Missouri Pacific Railroad
Company, a Bankrupt Debtor, Appellant,

v.

Neal Wiley, Appellee

GRIFFIN SMITH, C. J. (dissenting)

My dissent is based upon what I believe to be a misconception by the majority of the effect of the evidence when contradictory statements of the plaintiff are considered and when improbabilities amounting to fantastic absurdities are weighed against the background.

That plaintiff was injured to some extent there can be no doubt. That he was employed by defendant when the accident occurred is admitted. That he was found in an unconscious condition near a fire on the right-of-way by the crew of a north-bound freight train is testified to by operatives who swore that the train was not flagged.

How the injury occurred is told only by the plaintiff who first acknowledged that he did not know. He subsequently gave a thirty-thousand-dollar account of having looked up into the blackness of night in time to see a piece of coal or slate fall from the tender of a freight train he claims to have flagged. A preponderance of the evidence is to the effect that no such train was being operated.

In actions at law in this court **substantial** evidence of an essential fact is required. Trial courts are concerned with a preponderance. But **substantial** evidence should not lose its significance and become confused with shadows of substance—shadows which in the instant case do not rise to the dignity of scintilla.

It is obvious that plaintiff's identification of the falling object was an incident of trial necessity and that the revised version was an inspiration seized upon after there was realization that the first explanation was insufficient under the Federal Employer's Liability Act.

Resourcefulness seems to have supplied the element of liability in a chain of contention which to me appears too weak to stand judicial test.

Mr. Justice Holt concurs in this opinion.

(Endorsed)
Filed September 9, 1940.
C. R. Stevenson, Clerk.

IN TESTIMONY That the above is a true copy of the dissenting opinion of the Supreme Court, in the case therein stated.

I, C. R. Stevenson, Clerk of said Court, hereto set my hand and affix the Seal of said Court at my office, in the City of Little Rock, this the 20th day of Sept., A.D. 1940.

(Signed) C. R. Stevenson, Clerk
By Frank H. Cox, D.C.